

Regardless of Potential Scrutiny, the Arbitration Clause of the Fair Pay and Safe Workplaces Executive Order (2014) Should Not Have a Resounding Impact

ASHLEY WINTERS

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On July 31, 2014, President Obama introduced a new Executive Order to federal contractors known as the Fair Pay and Safe Workplaces Order.¹ The Order has several sections, one of which (Section Six) precludes pre-dispute arbitration agreements from any federal contract worth over one million dollars.² This preclusion has sparked controversial ideas on where the President obtained the power to enact such an order; whether the order will face judicial review upon implementation; and how much of an effect the ban on pre-dispute arbitration agreements will have on employee claims. Despite the media's frequent headlines claiming that President Obama has taken initiatives outside his power, the Fair Pay and Safe Workplaces Order, also known as Executive Order 13673, has been justly enacted and should have minimal impact on the economy or on individual employees bringing claims that fall within the arbitration preclusion. Even without the mandated arbitration agreement that federal employers were including in their contracts, employees are incentivized to opt for arbitration over litigation. This article begins with an analysis of the new Order, and then explains why arbitration will still be the first choice dispute resolution method for employees bringing those pertinent claims.

I. INTRODUCTION TO THE FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER

Defining the Order and Its Implications

Executive Order 13673 contains several sections that are all designed to improve workplace practices and increase general productivity with federal contractors. The Order is broken into eight different objectives aimed to hold corporations accountable, crack down on repeat violators, promote efficient federal contracting, protect responsible contractors, focus on helping companies improve, give employees a day in court and information about their paycheck, and streamline implementation and overall contract reporting.³ The Order is designed to accomplish these objectives through disclosure requirements and setting boundaries on dispute resolution

¹ Jill Rosenberg & Gary Siniscalco, *Obama Executive Order Places New Burdens and Restrictions on Federal Contractors*, EMPLOYMENT LAW AND LITIGATION BLOG (Aug. 5, 2014), <http://blogs.orrick.com/employment/2014/08/05/759/>.

² *Id.*

³ *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, THE WHITE HOUSE (July 31, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>.

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systems. The Fair Pay and Safe Workplaces Order applies to all new federal procurement contracts worth more than \$500,000.⁴ It will be implemented in stages throughout 2016,⁵ so the effects of the Order will not actually be known for several years.

Section Six, the complaint and dispute transparency section, is the main concern for the purposes of this article. The language of this clause is:

Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million.⁶

This provision does not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items; employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or to a contract that can't be modified and included an arbitration agreement formed prior to the Order.⁷ Section Six of the Order is one small piece of the overall goal of the document, which is to maintain fair pay and safe workplaces by regulating federal contracts and increasing compliance with labor laws.⁸

There have been several bills presented to Congress in the past that have tried to limit the use of arbitration from certain fields, yet none of these managed to be enacted into law.⁹ The Arbitration Fairness Act would have

⁴ *Id.*

⁵ *Id.*

⁶ Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

⁷ *Id.*

⁸ *Id.*

⁹ Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, THE HERITAGE FOUNDATION (July

rendered all pre-dispute arbitration agreements invalid in employment, consumer, antitrust, and civil rights disputes.¹⁰ The Arbitration Fairness for Students Act similarly would have prohibited pre-dispute arbitration agreements from colleges and universities that participate in federal student assistance programs.¹¹ The Consumer Mobile Fairness Act would have invalidated pre-dispute arbitration clauses in contracts involving consumer mobile services or mobile broadband Internet access service, and the Fairness in Nursing Home Arbitration Act would have invalidated pre-dispute arbitration clauses between long-term care facilities and their residents.¹² There was also the Consumer Fairness Act, which tried to amend the Consumer Credit Protection Act to define pre-dispute arbitration clauses in consumer contracts to be an unfair and deceptive trade practice.¹³ As of now, none of these acts trying to invalidate pre-dispute arbitration agreements has been enacted into law because Congress has not been convinced that arbitration actually is unfair or bad for consumers.¹⁴ It actually appears to be the opposite; that arbitration opens the door for individuals to bring claims that they would not be able to bring in a purely litigation resolution system.¹⁵

II. PRESIDENTIAL AUTHORITY TO ENACT THE ORDER AND MINIMAL EFFECT OF SCRUTINY

A. History of the President's Authority to Sign Executive Orders

In order to fully understand what gives the President the authority to enact laws such as the Fair Pay and Safe Workplaces Order, it is essential to go back to the year 1949.¹⁶ In this year, the Federal Property and

17, 2013), <http://www.heritage.org/research/reports/2013/07/the-unfair-attack-on-arbitration-harming-consumers-by-eliminating-a-proven-dispute-resolution-system>.

¹⁰ See S. 878 and H.R. 1844, 113th Cong. (2013). See also H.R. 4181, 112th Cong. (2012) (barring arbitration agreements in employment contracts) and S. 2915, 111th Cong. (2009–10) (making an agreement between an employer and employee to arbitrate a claim of rape unenforceable).

¹¹ S. 3557, 112th Cong. (2012).

¹² H.R. 6351, 112th Cong. (2012).

¹³ H.R. 991, 111th Cong. (2009).

¹⁴ von Spakovsky, *supra* note 9.

¹⁵ *Id.*

¹⁶ Peter M. Shane, *Presidential Procurement Authority and Interests of Workers: The Statutory Basis for Obama Executive Orders on Federal Contracting*, ACS BLOG

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Administrative Services Act (“FPASA”) was enacted by Congress in order to empower the President to “prescribe policies and directives that the President considers necessary to carry out” FPASA’s purposes.¹⁷ These purposes consist of establishing “an economical and efficient system for . . . [p]rocur[ing] and supplying property and nonpersonal services for the federal government.”¹⁸ Presidents have relied upon the authority granted in FPASA for many different initiatives.¹⁹ According to Peter Shane, an expert in presidential powers, President Kennedy and President Johnson relied on the FPASA to prohibit race discrimination among federal contractors.²⁰ President Nixon also relied upon the 1949 Act when he sought equality in employment and required federal contractors to engage in affirmative action.²¹ Under FPASA, President Carter was able to require a system of temporary wage and price controls on federal contractors, and President Bush passed an order requiring that all federal contractors let their employees know that they have a right not to join a union.²² Each of these orders has been challenged in court and upheld,²³ which indicates the strength of the FPASA in protecting the President’s authority to sign orders relating to federal contracts.

B. Relation of the Fair Pay and Safe Workplaces Order to the Franken Amendment

The Franken Amendment is a law issued on December 8, 2010 that applies to any contract in excess of \$1 million appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act and executed after February 17, 2010 (the effective date of the Franken Amendment).²⁴ This Amendment prohibits those funds for any contract that

(Aug. 14, 2014), <http://www.acslaw.org/acsblog/presidential-procurement-authority-and-interests-of-workers-the-statutory-basis-for-obama>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Frank Murray, *Assessing the Franken Amendment*, LAW360 (Feb. 16, 2011), <http://www.foley.com/files/Publication/b7719898-db14-44bc-bc2d-b47ede0b7e6c/Presentation/PublicationAttachment/fdc6a5db-da4a-4517-bc83-b6679194089b/AssessingTheFrankenAmendment.pdf>.

requires its employees to arbitrate a Title VII or tort claim arising out of sexual assault or battery.²⁵ Essentially, the Franken Amendment “withhold(s) defense contracts from companies . . . if they restrict their employees from taking workplace sexual assault, battery and discrimination cases to court.”²⁶ This makes President Obama’s Executive Order an extension of the Franken Amendment, now applicable to all federal contractors with contracts valued at more than \$1 million, not just federal defense contracts.

The Franken Amendment was pushed through Congress by Senator Al Franken, who devised the change from a case involving a female who claimed to be sexually assaulted while working in Iraq.²⁷ Senator Franken had a real battle to get the bill to pass, but was eventually successful. He argued that:

Article 1 Section 8 of our Constitution gives Congress the right to spend money for the welfare of our citizens. Because of this, Chief Justice Rehnquist wrote, ‘Congress may attach conditions on the receipt of federal funds and has repeatedly employed that power to further broad policy objectives.’ That is why Congress could pass laws cutting off highway funds to states that didn’t raise their drinking age to 21. That’s why this whole bill [the Defense Appropriations bill] is full of limitations on contractors—what bonuses they can give and what kind of health care they can offer. The spending power is a broad power and my amendment is well within it.²⁸

²⁵ *Id.*

²⁶ Cynthia Dizikes, *Senate Passes Franken Amendment Aimed at Defense Contractors*, MINNPOST (Oct. 6, 2009), <http://www.minnpost.com/politics-policy/2009/10/senate-passes-franken-amendment-aimed-defense-contractors>.

²⁷ Murray, *supra* note 24 (The case was that of Jamie Leigh Jones, who claimed to have been raped by multiple men in her employer-provided housing while working in Iraq. When she returned to the U.S., she tried to sue in court, but her employer, Kellogg Brown & Root, sought to enforce the arbitration agreement in her employment contract for any claim “related to her employment” or based on personal injury “arising in the workplace.” The court decided that Jones’s claims were not related to her employment, but Senator Franken insisted that his amendment was necessary to prevent other federal defense contractors from requiring arbitration for their employees’ sexual assault or harassment claims.).

²⁸ Dizikes, *supra* note 26.

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With these arguments, the bill was passed and was implemented in 2010.²⁹ Despite the success of Franken's arguments in the Senate, there were still some critics of the law even after its enactment. One opponent expressed his view that, "Congress should not be involved in writing or rewriting private contracts."³⁰ Those that held this view for an amendment put through by Congress may certainly be opposed to essentially the same actions done by solely the President on his own accord and authority, without the support of the legislative body.

C. Basis for Judicial Challenge

Despite the overwhelming judicial support of orders signed on the basis of FPASA, there is no guarantee that an order signed on this basis will be upheld.³¹ President Clinton was not as successful in court when he tried to back his attempt to use FPASA to prevent federal contractor employers from permanently replacing employees while they were on strike.³² The court did not; however, strike down this order on the basis of lack of authority, but because it was in direct conflict with the National Labor Relation Act's authorization for employers to replace strikers.³³ There are "no statutes in direct or even implicit conflict with the Obama orders," so the basis for the only overturned FPASA executive order could not be considered the

²⁹ Murray, *supra* note 24.

³⁰ Dizikes, *supra* note 26.

³¹ For some of the arguments against upholding the order, *see generally* Jeff Leieritz, *ABC Asks President to Withdraw "Fair Pay and Safe Workplaces" Executive Order*, (Nov. 7, 2014), ASSOCIATED BUILDERS AND CONTRACTORS, INC. <http://www.abc.org/NewsMedia/NewsReleases/tabid/144/entryid/2937/-abc-asks-president-to-withdraw-fair-pay-and-safe-workplaces-executive-order.aspx> (saying that "[t]his executive order dramatically changes the enforcement mechanisms carefully put in place by Congress and needlessly adds uncertainty, subjectivity and onerous and costly new data collection and reporting requirements for federal contractors"); *PSC Tells White House to Fix Fair Pay and Safe Workplaces Executive Order*, PROFESSIONAL SERVICES COUNSEL (Oct. 14, 2014), http://www.pscouncil.org/News2/NewsReleases/2014/PSC_Tells_White_House_to_Fix_Fair_Pay_and_Safe_Workplaces_Executive_Order.aspx (stating that the "executive order is contrary to existing law, would result in exorbitant increased costs to the government and companies, and lacks an executable framework").

³² *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, *supra* note 3.

³³ Shane, *supra* note 16.

justifiable rationale for overturning Obama's Fair Pay and Safe Workplaces order.³⁴

Just because there has not yet been precedent of an executive order derived under FPASA overturned for a reason other than conflicting statutes does not mean it cannot occur. Peter Shane says that, "to be sustained under FPASA, a presidential directive must have a rational, non-arbitrary relationship to the goal of 'an economical and efficient system' of federal procurement."³⁵ He also explains why the Fair Pay and Safe Workplaces Order accomplishes that goal:

Executive Order 13673 does not spell out why employers with million-plus dollar federal contracts should be barred from using mandatory arbitration in civil rights and sexual harassment claims. The rationale, however, seems plain. Unlawful discrimination and sexual harassment both interfere with the economical and efficient performance of contracts. The availability of mandatory arbitration, which is less public and less costly for employers than litigation, may reduce employer incentives to comply meticulously with the law. By limiting the ban on mandatory arbitration to winners of large contracts, the executive order holds in place whatever incentive for legal compliance is created by potential litigation, while (a) leaving employees of those contractors the option of arbitration where it appears the favorable course and (b) still allowing smaller federal contractors the benefits of lower-cost mandatory arbitration.³⁶

The argument of this article is that the Order remains in compliance with all of the necessary requirements of a valid executive order just as Shane suggests, and that employees should take advantage of "(b)," mentioned above,³⁷ by choosing arbitration even when it is not imposed upon them.

III. EMPLOYEES SHOULD STILL CHOOSE ARBITRATION POST DISPUTE; COMPARISON OF ARBITRATION AND LITIGATION

Although the Order now bans the use of pre-dispute arbitration agreements in relation to employees bringing sexual harassment or Title VII

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

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claims, that does not mean that employees should not choose to voluntarily pursue arbitration after the dispute arises as a resolution method. Section Six is simply in place to prevent employers from making arbitration *mandatory*. In a comparison of arbitration and litigation for these claims, employees should voluntarily choose arbitration, making the effect of the applicable provision of the Order minimal at best. There are many reasons why employees will be enticed to bring their claims through arbitration instead of litigation, including that arbitration generally takes less time, is more reliable, and is cheaper than litigation, amongst many other reasons.

A. Arbitration Generally Takes Less Time than Litigation

The preclusion of appeal rights has often been the topic of controversy for analysts of arbitration. On one hand, it leaves unsatisfied parties with no means of review on the merits.³⁸ On the other, it could potentially save both parties significant amounts of money and time.³⁹ In 2008, the median length of time from the filing of an arbitration demand to the making of a final award was 7.9 months.⁴⁰ The 2010 litigation statistics say that the median amount of time from filing to the end of trial in civil cases was 33.2 months, and that amount is extended an additional 7 months to 40.8 months in cases that were sent to appeal.⁴¹ In a case study focusing specifically on employment dispute claims, the mean time to disposition in arbitration was 284.4 days for those that settled and 361.5 days for those that were issued awards after a hearing.⁴² This aligns with the AAA Arbitration Roadmap, which anticipates an average award being issued in 297 days.⁴³ In federal

³⁸ Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, ABA SECTION OF DISPUTE RESOLUTION, http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

³⁹ *Id.*

⁴⁰ *Id.* (Keep in mind that these statistics are for domestic commercial disputes, not for the type of dispute under the EO. The litigation statistics were gathered from the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals.)

⁴¹ *Id.*

⁴² Colvin, Alexander, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, IRL Collection at DigitalCommon@ILR (2011), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles>.

⁴³ AAA Arbitration Roadmap, *American Arbitration Association Dispute Resolution Services Worldwide* (2007), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003838

court for employment discrimination, the mean time to a hearing was 709 days, and in state court the mean was 723 days.⁴⁴ An older study from 1997 also supports the finding that arbitration can move substantially faster than litigation for employment claims.⁴⁵ This data showed that the mean time from filing to judgment for employment arbitration was 16.5 months, (495 days), while the average time from filing to judgment for litigation was 25 months (750 days).⁴⁶ These studies show that employment related arbitration has been consistently faster than employment related litigation over the past twenty years.⁴⁷ The more time spent on a lawsuit, the more resources go into it.⁴⁸ Employees have a lot of motivation to spend the least amount of both time and money on their dispute resolution, especially when going against an employer with unlimited resources.

B. Courts are Less Reliable Than Arbitral Tribunals

Despite the general feeling of reliability in the court structure, there is still the chance that a “court crisis” could occur, limiting the availability of a judicial setting in which to seek resolution and delaying the process even further. In the early 2000s there were several courts that were forced to make drastic changes that limited their ability to hear cases due to budget cuts.⁴⁹ While the chances of this set back arising in the judicial setting in which an employee seeks to bring her case are unlikely, there are several instances where this has actually happened.⁵⁰ One article provides a list of examples that are eye opening to the effects that budget cuts can have on the judicial system:

Oregon closed courthouses every Friday from March through June and postponed processing minor criminal cases. Colorado froze hiring throughout the court system and mandated eight days of unpaid furlough for all court employees. Alabama temporarily suspended jury trials in 2002. In 2002, Massachusetts cut 1,000 court employees, with the result that judges in twenty-five Superior

⁴⁴ Colvin, *supra* note 42.

⁴⁵ *Business-to-Business Mediation/Arbitration vs. Litigation*, NAT’L ARBITRATION FORUM, Jan. 2005 at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*; Colvin, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ *Business-to-Business Mediation/Arbitration vs. Litigation*, *supra* note 45, at 3.

⁵⁰ *Id.*

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Courtrooms had no support staff and stopped conducting civil trials. New Hampshire suspended jury trials for two months in 2002 and for three months in 2003.⁵¹

Even though the chances of budget cuts impacting employment litigation claims is not likely, it is something to keep in mind as an employee deciding which avenue to bring a claim. Reliability of the resolution system is essential to the completion of these cases, especially when they can drag on for up to several years. Plaintiffs need to feel secure that their chosen method will still be available as their case progresses, and governmental funding can impact the security of the judicial system in a way that arbitral tribunals are not exposed to. Even though the court systems have not yet completely disappeared as an option for plaintiffs, all of these instances are examples of when the absence of a court system has delayed the process and increased the burden of dispute resolution. This delay affects all of the other factors that are considered when making a resolution process decision, such as time, money, and effectiveness.

C. Arbitration is Cheaper Than Litigation for Employees

One of the major benefits and goals of arbitration is to keep costs down for the involved parties. This aspect of arbitration has been a selling point for the resolution method since its creation, and probably the main reason that federal contracts were continuously including pre-dispute mandatory arbitration agreements prior to the Executive Order.⁵² There are many reasons for the lower costs involved with arbitration: less discovery, lack of

⁵¹ *Id.* (There are also several examples of judges speaking out about this “court crisis”. Kevin S. Burke, Chief Judge of the Minnesota’s Fourth Judicial Court, expressed concern about the effects court closings would have on the community as far as the health of children, families, and the economy. This soon became reality for Minnesota when the state suffered a \$3 billion shortage of funding and the courts were forced to raise civil court filing fees by \$100 to \$235 per case and imposed a fee of \$55 for filing a motion. A Los Angeles proposed budget would have forced the closing of sixty to one hundred courtrooms country wide, but Los Angeles Superior Court Judge Robert A. Dukes came forward and helped raise the budget to what was acceptable to prevent those closures from occurring.)

⁵² See, e.g., Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, ABA SECTION OF DISPUTE RESOLUTION, http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

ability to appeal, greater flexibility.⁵³ In employment litigation, the median total cost of the dispute is \$88,000.⁵⁴ The majority of that money (about \$40,000) is spent on the actual trial itself, over \$15,000 is spent on discovery, and just under \$15,000 is spent on pre-trial tasks.⁵⁵ The remaining \$18,000 is spent on court and filing fees and post-trial costs.⁵⁶

The reason why the actual trial period of litigation is so expensive is because of the amount of time it entails and the attorney's fees that cumulate over that amount of time.⁵⁷ These fees are minimized in arbitration because of the shorter time period that a dispute resolution takes.⁵⁸ Costs are also reduced in other areas, such as discovery. Recently, the Labor, Employment, and Elections Division of the American Arbitration Association ("AAA") created the AAA Initial Discovery Protocols for Employment Arbitration Cases.⁵⁹ These protocols were designed to encourage parties to exchange information relevant to the case early on in the resolution process in order to increase speed and effectiveness.⁶⁰ Pre-trial expenses are also narrowed in arbitration in certain areas, such as evidentiary issues, *voir dire*, jury charges, broad motion practice, proposed findings of fact, authentication of documents, qualification of experts, and cumulative witnesses.⁶¹

As far as the cost to file a claim in either arbitration and litigation goes, arbitration comes out easily the better choice for an employee looking to bring a claim.⁶² In a study based upon American Arbitration Association calculations and 3,945 arbitration cases, the mean arbitration fees (not including the cost of an attorney), were \$6,340 per case total and \$11,070 for cases disposed of by an award following a hearing.⁶³ In 97% of these cases

⁵³ *Id.*

⁵⁴ Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, NAT'L CTR. FOR STATE COURTS (Jan. 2013), http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csp_online2.ashx.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Sussman & Wilkinson, *supra* note 52.

⁵⁸ *Id.*

⁵⁹ AM. ARBITRATION ASS'N, 2013 ANNUAL REPORT AND FINANCIAL STATEMENTS, (May 15, 2014).

⁶⁰ *Id.*

⁶¹ Sussman & Wilkinson, *supra* note 52.

⁶² AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (Nov. 1, 2014), <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2025292>.

⁶³ *Id.*

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the employer paid the entire cost of the arbitration fees beyond a small filing fee, pursuant to AAA procedures.⁶⁴ For disputes arising out of employment agreements, the employee is responsible for a filing fee capped at \$200, and the employer pays a significantly higher fee based upon a fee schedule.⁶⁵ On the other hand, litigation fees all depend on the type of case and damages sought, amongst an array of other factors that all add up quickly. The fact arbitration has a set filing fee for employees is a definite benefit for an individual trying to keep costs at a minimum.

While it is easy to see why employees would want to keep their own costs down when pursuing a claim against their employer, it may be beneficial in the long run for employees to keep their *employers'* costs down as well. The expenses that employers put into the cost of litigation could affect employees through lower wages or reduced share value.⁶⁶ A 1997 U.S. General Accounting Office study pointed out two specific companies that established alternative dispute resolution (ADR) programs after suffering the consequences of the expense litigation had on their company.⁶⁷ The first developed its ADR program after it spent \$400,000 defending itself successfully against an employment claim.⁶⁸ The company had to spend that large sum of money in litigation costs to come out the winner; the costs are obviously exponentially higher for those companies that do not win their claim because of the additional cost of damages. Another company in the same situation spent \$1 million in attorneys' fees to successfully defend a claim.⁶⁹ After the companies implemented their ADR programs, their legal expenses dropped drastically; the first company's legal fees went down by 90 percent.⁷⁰ The new ADR program, consisting of a combination of arbitration

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, THE HERITAGE FOUNDATION (July 17, 2013), <http://www.heritage.org/research/reports/2013/07/the-unfair-attack-on-arbitration-harming-consumers-by-eliminating-a-proven-dispute-resolution-system>.

⁶⁷ *Id.* (Although these new ADR programs used mediation as well as arbitration methods to solve disputes, these situations are still excellent examples of how much litigation really costs a company. Both of these companies were successful in their cases, but were required to spend a lot of money to come out that way. This article recommends choosing only arbitration as a dispute resolution method, but these ADR programs using an arbitration/mediation combination method are still good examples of the difference in cost between litigation and other resolution systems.)

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

and mediation, cost less than half of the legal fees that the company used to spend on just on employment litigation matters.⁷¹ The program also increased the amount of settlements, so employees were still able to have their claims recognized in a beneficial dispute resolution method and come out with some type of compensation.⁷²

One of the major benefits of an arbitral decision-making process as opposed to litigation is the ability of the parties to choose who will be deciding the dispute. The parties can base this decision off of many different characteristics, including: “subject matter expertise, reputation or competence, temperament; number of years of experience; number of arbitrations chaired, availability, and commitment and ability to conduct an efficient, cost-effective arbitration.”⁷³ In court cases, judges are assigned without regard to the parties’ wishes or concerns.⁷⁴ Because the Fair Pay and Safe Workplaces order prohibits making these decisions pre-dispute through a mandatory arbitration agreement, all of these terms will have to be agreed upon post dispute. This presents a challenge for disagreeing parties to come together and agree on the terms of their resolution process, which is one aspect that may give employees a reason to lean towards litigation. But even this problem with arbitration can be overcome, because most arbitral tribunals provide for a method of arbitrator selection in the case that the parties cannot agree.⁷⁵ In fact, many of the terms needed for an arbitration proceeding can be filled in by the arbitral tribunal.⁷⁶ This means that in the worst-case scenario, if the parties absolutely cannot agree on anything, the rules will be decided for them, just as they would in a courtroom.⁷⁷ In the best-case scenario, the parties are free to choose their arbitrator(s), and take advantage of the flexibility of the arbitral process that will be discussed in more detail below.

Obtaining counsel for employment litigation cases has become a real problem for plaintiffs suing their employers.⁷⁸ In reality, in order for an employee to get an attorney for an employment case she would need a claim worth at least \$60,000 for an attorney to be willing to represent her.⁷⁹ One of

⁷¹ von Spakovsky, *supra* note 66.

⁷² *Id.*

⁷³ Sussman & Wilkinson, *supra* note 52.

⁷⁴ *Id.*

⁷⁵ AM. ARBITRATION ASS’N, *supra* note 62.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ von Spakovsky, *supra* note 66.

⁷⁹ *Id.*

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the founders of the National Employment Lawyers' Association testified, "employment attorneys turned away at least 95% of employees who sought representation."⁸⁰ Because of the economic realities of the litigation system, one study showed that only around 5% of employees that claim to have been discriminated against actually have access to litigation.⁸¹ In light of the increased cost associated with litigation combined with the difficulty of retaining counsel, employees either have to option to pursue a less expensive method, such as arbitration, or drop the claim and remain empty-handed.

Despite the evidence presented above, another case study found that the counsel fees for arbitration tend to be higher than those for litigation.⁸² The study looks at 19 single plaintiff cases, 9 of which were solved through arbitration and 10 of which were solved through litigation.⁸³ The arbitration outside counsel fees totaled an aggregate of \$710,323.50, averaging \$78,924.84 per case, while the litigation total for counsel fees was \$631,443.28 and averaged only \$63,144.33 per case.⁸⁴ Total costs for arbitration, including the whole proceeding and cost of counsel, totaled to \$921,042.22, with an average per-case expenditure of \$102,338.02.⁸⁵ Total litigation costs including outside counsel, added up to \$704,908.20, with an average per-case expenditure of \$70,490.82.⁸⁶ While this study shows that arbitration costs an additional \$15,000.00 per case in outside counsel alone, and an additional \$30,000.00 total per case total, the study does not clarify the subject matter of the disputes.⁸⁷ This article is not concerned with an overall comparison of arbitration versus litigation in the corporate context but is focused solely on the advantages of choosing arbitration for discrimination and sexual harassment claims. While a study such as this one may provide some insight and create doubts as to whether arbitration is cheaper as a whole, it does not provide definite evidence that it is more expensive for employees bringing claims relevant to the Fair Pay and Safe Workplaces Order.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Alan Dabdoub & Trey Cox, *Which Costs Less: Arbitration or Mediation?* (Dec. 6, 2012), <http://www.insidecounsel.com/2012/12/06/which-costs-less-arbitration-or-litigation>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

D. Win Rates

“Employment discrimination plaintiffs do worse than other plaintiffs—they have to go to trial more often because they are less likely to obtain a favorable early disposition; they win those trials less often; they face proportionately more appeals from those wins; they suffer proportionately more reversals of those wins.”⁸⁸ From 1988-2000, there were 859 employment discrimination cases decided by federal courts out of 5,173 total decided cases.⁸⁹ Of the 859 relevant cases, plaintiffs only won 268 of them.⁹⁰ These statistics do not take into account the appeals process, but look solely at the win rate for plaintiffs at the district level.⁹¹ It is hard to find an exact comparison of employment litigation claims and employment arbitration claims. For example, from 1997-2001, 2,159 employment cases were filed with the American Arbitration Association.⁹² This data compared to the previous litigation data suggests that there are substantially more arbitration employment cases filed than litigation; however, the 859 court cases were actually *decided* by the court (and federal court at that. State court cases were not included in these numbers), whereas the 2,159 arbitration cases were simply *filed*.⁹³ This article has already addressed how the majority of employment discrimination cases are settled, so that may account for the large discrepancy in data.⁹⁴

Another study that attempts to do a direct comparison of win rates in employment litigation versus employment arbitration seems to align quite well with the data addressing appeal win rates.⁹⁵ Lewis Malthy states that employees were successful in 63% of arbitration claims and only successful in 14.9% of court cases.⁹⁶ One researcher has discovered that the win rates

⁸⁸ Kevin M. Clermont & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 455 (2004).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2004).

⁹³ *Id.*

⁹⁴ See Sussman & Wilkinson, *supra* note 52.

⁹⁵ Eisenberg & Hill, *supra* note 92.

⁹⁶ *Id.* (Even this direct comparison is not perfectly on point with the Fair Pay and Safe Workplaces Act effects; however, because “he compared arbitrated disputes that are not dominated by employment discrimination claims with litigated discrimination disputes.”)

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for employment discrimination claims depend on whether the case was decided by judge or jury.⁹⁷ “[E]mployment discrimination plaintiffs have won only 19.29 percent of judge trials but 37.77 percent of jury trials. Although employment discrimination plaintiffs have won fewer than one in five of their judge trials, other plaintiffs have won 45.91 percent of their judge trials (and 44.82 percent of their jury trials).”⁹⁸ This data suggests employees are more successful with a jury trial and reinforces the idea that employment discrimination claims do not fair as well in a judicial setting as other types of claims.

Within arbitration, there seems to be a difference of success rates depending upon the salary of the employee bringing the claim.⁹⁹ In the American Arbitration Association, employees bringing civil rights related claims with a classified “high salary” had a win rate of 40%.¹⁰⁰ Employees bringing civil rights related claims with a classified “lower salary” had a win rate of 24.3%.¹⁰¹ This data, collected from 1999 and 2000, actually showed that court claims had a higher success rate for employees than arbitration. State court employment discrimination trials yielded a 43.8% win rate for employees, while federal court employee discrimination trials showed a 36.4% win rate for employees.¹⁰²

In conclusion, researchers do not seem to have a solid grasp on which forum, either the judicial setting or the arbitral tribunal, provides higher success for employees bringing employment discrimination and sexual harassment claims. The Fair Pay and Safe Workplaces Order, as an initiative put in place to protect employees, seems to insinuate by banning mandatory arbitration that employees will be more successful in the courtroom, but there just is no solid evidence to support that claim. Therefore, the Order does not have any impact on the success employees can have with their claims, regardless of the forum in which they are brought.

⁹⁷ Clermont & Schwab, *supra* note 88, at 458.

⁹⁸ Eisenberg & Hill, *supra* note 92.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

E. Even When Plaintiffs are Given the Opportunity to Appeal in Litigation, They are Rarely Successful

One of the many reasons that arbitration is both cheaper and quicker than litigation is because there is limited ability to appeal the arbitral decision.¹⁰³ This can be seen as a pitfall of the arbitral system; however, studies show that when plaintiffs do appeal the court's decision, they are very rarely successful.¹⁰⁴ Therefore, losing the chance to go through the appeal process is not actually a negative aspect of arbitration because those employee appellants do not often succeed anyway.

Employment litigation is an extremely common topic seen in the federal courts and is now the largest single category of cases, making up 10% of the entire federal civil docket.¹⁰⁵ Of these employment cases, Title VII claims make up the majority.¹⁰⁶ The study providing these statistics also shows that almost 70% of employment discrimination cases are finally resolved by settlement.¹⁰⁷ The cases that are not settled but are decided by a court judgment show that employment discrimination claims have a higher appeal rate than other types of claims, and of these, plaintiffs' appeals are 17 times more frequent than defendants' appeals.¹⁰⁸ This means that employment cases are much more likely to be appealed than other types of cases, and plaintiffs are much more likely to be the party doing the appealing. Despite this, defendants are more likely to actually succeed and get a reversal upon appeal (keep in mind that defendants in employment discrimination cases are the companies).¹⁰⁹ In fact, defendants in employment discrimination cases actually do better in appeals than defendants of other types of cases, and plaintiffs in employment discrimination cases actually do worse in appeals than those of other types.¹¹⁰ In all types of cases, the total reversal rate for defendants is 31% and for plaintiffs is 14%, but in employment

¹⁰³ See Clermont & Schwab, *supra* note 88 at 457. (The general assertion is that there is no ability to appeal an arbitral decision, however, there are very few grounds in which a party actually can appeal to the judicial court system and ask for review there. These grounds are beyond the scope of this article and are mostly procedural, not based upon the merits.)

¹⁰⁴ *Id.* at 452.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

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discrimination cases, the reversal rate for defendants is 42% and for plaintiffs is only 8%.¹¹¹ Employees should be careful about choosing litigation over arbitration solely because of the right to appeal. The 8% success rate on appeal is daunting on its own, especially compared to the chance that the employee will initially come out successful and the employer will take advantage of those appeal rights and have a 42% chance of reversal.¹¹² As easy as it may be to reach for a venue that allows appeals, these statistics highlight that an appeal is likely to cost more money over more time and lead to more disappointment for a plaintiff in a discrimination or harassment case.

F. Dispute Resolution Involves Humans Subject to Human Behavior

Expanding upon the lack of appeal rights in arbitration is the human behavioral aspect of the need for finality. Conflict resolution is a necessary part of human interaction, and recently, legal scholars have also become interested in how behavioral aspects come into play within resolution systems.¹¹³ While the inability to appeal in most circumstances may be considered a downfall, it seems as though the finality that comes with an arbitral decision may be worth more than meets the eye. "[A]lthough necessary and important in some cases, conventional legal processes, like adjudication and adversarial negotiation, are often inadequate for a fuller satisfaction of human needs and interests, and so we must look to other processes than traditional institutions or practices, depending on the kind of conflict or dispute at issue."¹¹⁴ Humans instinctively look for a resolution process that they will be comfortable in, will give them a fair result, and ends the conflict they were facing. While it is obvious litigation does meet each of these goals, arbitration may do a better job of satisfying those needs and meeting those subconscious standards. "[F]airness in procedures for resolving conflicts is the fundamental kind of fairness, and that it is acknowledged as a value in most cultures, places, and times: fairness in procedure is an invariable value, a constant in human nature."¹¹⁵ The idea of *process pluralism*, the ability for all parties to be heard in a dispute, is an

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 4–27 (2004).

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at 7.

area which makes arbitration much more attractive to the typical plaintiff.¹¹⁶ Studies have shown that some parties to arbitration feel much more likely to be heard than others who proceed with a litigation route.¹¹⁷ More modern studies have even shown that the ability to actually participate is another growing need for humans engaged in conflict resolution.¹¹⁸ Parties to arbitration are still represented by attorneys, but they are given much more reign to participate and engage in the process as opposed to litigation where parties sit quietly next to their counsel and leave their fate purely in their attorney's hands. Parties to arbitration also have the ability to construe their own arbitration agreements, which is a huge way for the plaintiff to feel involved and interactive in his or her dispute resolution process.

One thing to keep in mind as employment discrimination/ sexual harassment plaintiffs make their choice between litigation and arbitration is what the goal actually is. Now that the Executive Order provides these plaintiffs with options, if both plaintiffs and attorneys keep these goals in mind the arbitration may very likely serve as a solid system in which to reach and accomplish them.

In many conflicts people act in a way that seems to go against their interests. Sometimes they seem more interested in having their day in court than in arriving at a solution that gives them what they need. They are sometimes more interested in expressing their feelings than getting results. . . . Lewis Coser proposes two components of conflict in his classic work, *The Functions of Social Conflict* (1956). One, which he labels "unrealistic," is people's need for some form of energy release. The other component, which he labels "realistic," is people's desire for a result that will meet their needs. The unrealistic component will not be satisfied by a good solution, but instead requires listening, ventilation, acknowledgment, validation, a day in court, or some means of expressing or releasing the feelings and energy associated with a conflict. The realistic component requires a satisfactory solution, one that addresses people's essential interests.¹¹⁹

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 9.

¹¹⁸ *Id.*

¹¹⁹ Bernard S. Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention*, 1–14 (2d ed. 2012).

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Keeping that information in mind, the aspects of arbitration that this article has already discussed, such as the timing, cost, and effectiveness of arbitration, the alternative dispute resolution system may be more effective and meet the needs of plaintiffs better than the traditional litigation route. Arbitration will accomplish both the unrealistic needs of being heard and acknowledged (having “a day in court”) as well as the realistic component of reaching a solution that satisfies their essential interests.¹²⁰

G. Arbitration Creates More Flexibility for the Parties

Another reason why employees will be likely to stick with an arbitration dispute resolution process even when it is not mandated is because of the flexibility of the resolution method. With arbitration, the parties work with the arbitrators to schedule hearings and deadlines.¹²¹ These meetings can occur at more convenient locations as determined by the parties or after normal business hours if needed; whereas, the court system must adhere to strict protocol.¹²² In arbitration, witnesses can be questioned out of order if it is more convenient, over the telephone or video chat, or even using written testimony in place of in-person testimony.¹²³ The same can be said for experts needed during the proceedings.¹²⁴ The parties also have the option to contract the timing of the resolution process.¹²⁵ They can set deadlines, limit the amount of time to be spent on each phase of the arbitration, and then hold each other accountable throughout the process in order to stick to those goals.¹²⁶ Contracting out these types of terms in an arbitration agreement is usually easier to do pre-dispute, so the preclusion of pre-dispute arbitration agreements done by the Fair Pay and Safe Workplaces order actually lessens some of these flexibility benefits common to arbitration practice. It is much harder for parties in dispute to agree to these terms once they are already in a hostile relationship. Regardless of the potential tension between the parties at this point, coming to an agreement on the flexible terms of arbitration is in both parties’ best interest and therefore provides incentive for them to get

¹²⁰ *Id.* at 12.

¹²¹ Sussman & Wilkinson, *supra* note 52.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

along long enough to set limitations and restrictions on their resolution method.

H. *Arbitration is More Confidential*

Confidentiality is often considered a valuable trait of arbitration for both the employee and the employer. Employers obviously have a stake in keeping discrimination and sexual harassment claims quiet, but employees asserting these claims can also benefit from a more confidential method of dispute resolution. Many times victims of sexual harassment will choose not to seek compensation at all because of the public nature of a trial and having to speak openly about personal issues. The Equal Employment Opportunity Commission ("EEOC") places an emphasis on maintaining the employee's confidentiality wherever possible, in order to encourage other potential victims to come forward.¹²⁷ While there are laws in place to prevent employers from retaliating against employees that speak out about sexual harassment in the workplace,¹²⁸ that does not make it any easier for the employee personally. The Seventh Circuit has openly stated in *Union Oil* that, "[p]eople who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials."¹²⁹

Arbitration hearings are held in private, with only designated members present such as the parties and their counsel.¹³⁰ The content of these hearings should also contractually be made confidential.¹³¹ All members of the arbitral proceedings that are present at the hearings should agree not to go to the press about specific issues or the entire proceeding in general.¹³² These precautions help keep private hearings just between those that are involved and engaged in the proceeding and away from members of the general public and the media.¹³³ Trial proceedings, on the other hand, are held publicly at the courthouse.¹³⁴ Although counsel can request for the record to be sealed

¹²⁷ Ida L. Castro, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), <http://www.eeoc.gov/policy/docs/harassment.html>.

¹²⁸ Sussman & Wilkinson, *supra* note 52.

¹²⁹ *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

¹³⁰ Sussman & Wilkinson, *supra* note 52.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

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and to be kept confidential, this very seldom is granted.¹³⁵ The courts have a responsibility to keep public proceedings just that: public, while arbitral institutions do not have that incentive and therefore often have confidentiality rules built into their guidelines.¹³⁶ An article from the New York Law Journal warns against this “false security;” however, and emphasizes the importance of *contractually* protecting confidentiality and not approaching the arbitration with a false presumption of security.¹³⁷

Confidentiality also comes with one possible pitfall for employees asserting discrimination or harassment claims: employers that are threatened by lawsuit may be more likely to settle with an employee because of the public nature and embarrassment that could accompany the lawsuit.¹³⁸ While this may be a huge factor in an employee’s choice to pursue litigation, there is legislation passed that counteracts any benefit that this strategy may have.¹³⁹ Due to public outcry over cases that settled privately involving “toxic tort claims, design defects, sexual harassment, and the Catholic Church’s sexual abuse scandal,” there are now laws in place that limit the ability to make private, confidential settlements relating to these types of claims.¹⁴⁰ This type of legislation places enormous barriers on the ability to keep matters private and confidential during a litigation proceeding, while arbitration remains open to become a contracted “safe haven.”

I. Settlement

So what is the effect of settlement on employment discrimination and sexual harassment claims? Many agree that Congress intended to encourage voluntary settlement of employment discrimination claims.¹⁴¹ According to a University of Pennsylvania Law Review Article, approximately 70% of all employment discrimination claims end in settlement.¹⁴² If this is true, it may support the idea that the changes implemented through the Fair Pay and Safe Workplaces Order will have minimal effect. If an employee brings a claim

¹³⁵ *Id.*

¹³⁶ Sussman & Wilkinson, *supra* note 52.

¹³⁷ Samuel Estreicher & Steven C. Bennett, *The Confidentiality of Arbitration Proceedings*, N.Y. L.J., Aug. 13, 2008.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Robert D. Friedman, *Confusing the Means for the Ends: How A Pro-Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. PA. L. REV. 1361, 1363 (2013).

¹⁴² *Id.*

through arbitration, nothing has changed because that is what she was previously required to do, but if she chooses to pursue her new option of litigation then the case is more than likely going to settle out of court anyway.¹⁴³

IV. THE POTENTIALLY NEGATIVE SIDE OF ARBITRATION

Arbitrators Lack Diversity; Employees Bringing Discrimination or Sexual Harassment Claims May Feel More Comfortable in a Forum Where They are More Likely to Get a Decision Maker of Similar Race or Gender

While a lot of the statistics on arbitrator diversity are outdated, it is alarming that there was such a lack of diversity in the profession even thirty years ago. In 1985, 91.5% of all arbitrators were male, and 96.5% of all arbitrators were white.¹⁴⁴ Therefore, even though parties have the opportunity to choose their arbitrators, it was almost 100% certain that you would be choosing a white male.¹⁴⁵ There are entire articles on the problems this uniform arbitrator pool present; however, for the purposes of the claims that fall within the Fair Pay and Safe Workplaces Order, the problems are especially apparent. As an employee bringing a claim against a corporation, it may be important to feel like the decision maker of the claim understands where the plaintiff is coming from in order to lessen that small-player feeling. If a plaintiff is bringing a sexual harassment claim and is female, it may be important to her to have a female decision maker in order to help her feel comfortable; to help her feel that she is understood; and to help her feel like someone is able to see her point of view. In 1985, this was impossible.¹⁴⁶ This is not a new concern for researchers of arbitration. A 1999 article states:

¹⁴³ *Id.*

¹⁴⁴ Nicole Buonocore, *Resurrecting A Dead Horse-Arbitrator Certification As A Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483 (1999) (The average arbitrator, was not only a white male, but was also about 60 years old. This lack of youth may also contribute to a plaintiff in an employment claim feeling unrepresented because the 60-year-old white male arbitrator is probably able to connect with the corporation easier than with a young female of a different race).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

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Apart from diversity for diversity's sake, it is possible that awards rendered by women and minorities may be different from awards rendered by white males. While there is little or no data regarding whether female arbitrators decide cases differently than male arbitrators, one study correlated arbitrator age to arbitration awards. Results indicated that an arbitrator's age did play a role in how a case was decided. If age affects an arbitrator's award, one can presume that gender will also affect awards. This is especially true in sexual harassment cases, which are becoming more common. As labor forces grow more diverse in terms of both gender and race, the true beneficiaries of the arbitration process, the employees, may begin to question whether a system dominated by white male arbitrators is fair. A task force investigating due process concerns associated with arbitrating non-union employment relationships suggested that 'the roster . . . should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered . . .'¹⁴⁷

Now that employees have the ability to choose between arbitration and litigation after the Fair Pay and Safe Workplaces Order, the evidence of lack of diversity in arbitration may be enough to turn plaintiffs off of arbitration and lead them towards litigation. But, when data of the diversity in the judicial system is analyzed, the odds of getting a judge that is not a white male are not much better. As of 2009, there had been 110 Supreme Court Justices since it's founding in 1789, and 106 of them have been white males.¹⁴⁸ At the state level, 24 state supreme courts are entirely white, and two are entirely male.¹⁴⁹ While white males are only about 37.5% of the general population of the United States, they make up about 66% of judges on state appellate benches.¹⁵⁰ Because of the lack of diversity in both arbitration and litigation, it does not seem to matter where an employee brings a sexual harassment or employment discrimination claim. The only difference is that in litigation, employees are more likely to face a diverse pool in a jury trial made up of their peers. This may be enough to convince

¹⁴⁷ *Id.*

¹⁴⁸ Ciara Torres-Spelliscy, *A Bench That Looks Like America: Diversity Among Appointed State Court Judges*, JUDGES' J., (Summer 2009).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

plaintiffs to go to the courtroom now that they have the chance after the signing of the Order, but it does not seem to be an overwhelming reason to stray from voluntary arbitration.

V. ARBITRATION RESULTS V. LITIGATION RESULTS

A. Award Amounts

Another key aspect for employees to consider when given the option to pursue either arbitration or litigation after the Fair Pay and Safe Workplaces Order is their potential award if their claim is successful. One study interested in this aspect created two groups of decision makers: one made up of professional arbitrators, another made up of jury eligible citizens.¹⁵¹ This study faced the groups with a medical negligence case and asked each to decide the damages to be awarded for past pain and suffering and disfigurement.¹⁵² The median arbitration award was \$57,000 and the mean was about \$50,000, while the median mock-jury award was \$49,000 and the mean was about \$52,000.¹⁵³ Even though this study was not based upon employment discrimination cases, it is a good representation of the essentially non-existent difference of award amounts between arbitrators and jurors. An economist created a very similar study but in the context of automobile accidents in the state of California.¹⁵⁴ His study yielded the same results: there was no significant difference between arbitral award amounts and jury award amounts.¹⁵⁵ Even though some of these statistics seem to yield an inconclusive result, there is definitely no evidence that litigation is actually better in terms of award amounts; therefore, with the option now to choose between arbitration and litigation under the Fair Pay and Safe Workplaces Order a plaintiff should not be swayed in either direction.

Other researchers have discovered a difference in discrepancies of arbitral awards and litigated damages depending upon the salary range of the employee.¹⁵⁶ Unfortunately, there is a lack of court cases brought by lower income employees, probably due to their inability to afford the costs of

¹⁵¹ Eisenberg & Hill, *supra* note 92.

¹⁵² *Id.*

¹⁵³ *Id.* at 45.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 50.

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litigation.¹⁵⁷ Therefore, there is no way to compare employees with lower income's cases to those with a lower income that brought arbitration claims.¹⁵⁸ However, higher income employees' claims could be compared.¹⁵⁹ The study showed that in both arbitration and litigation the median award amount exceeded \$65,000, but there was no significant difference in award amounts between the two.¹⁶⁰ Because the Fair Pay and Safe Workplaces Order was signed in order to protect employee plaintiffs by allowing them to seek resolution in a judicial setting, it would be easy to assume that they would fare better in the courtroom in terms of win rates and award amount. Despite this easy assumption, there is no statistical evidence to prove its truth. Therefore, employees are just as likely to stick with arbitration now that it is no longer mandatory

B. Repeat Player Issues

One of the things that the Fair Pay and Safe Workplaces Order may have been trying to prevent by banning mandatory arbitration agreements is the "Repeat Player" issue. This problem occurs when a party becomes a regular participant in the arbitration process and becomes familiar to the arbitrators and arbitral tribunals.¹⁶¹ With a lot of employer disputes, employees are represented by unions so both the employer and the union become repeat players within the system.¹⁶² This repeat player effect is actually beneficial for both parties, because they have had the ability to find arbitrators that issue awards that are fair and reasonable to both sides.¹⁶³ If an arbitrator favored one side, the other would not allow that arbitrator to preside over the next issue between the two parties.¹⁶⁴ This increases the reliability and fairness of the arbitration system, and the repeat player effect is actually a benefit.¹⁶⁵ This phenomenon becomes an issue; however, when the employee is not represented by a union so the only repeat player is the employer.¹⁶⁶

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

The employer has a chance to use prior experience to know which arbitrators favor employers or issue the stingiest awards, etc.¹⁶⁷ The employees on the other hand have no experience with the arbitration system, and unless they are represented by a lawyer that is extremely familiar with this situation then they are going into the arbitration essentially blind and having to rely upon the employer's (their opponent's) experience.¹⁶⁸ Even if there is an attorney that often deals with employment discrimination or sexual harassment arbitration, the attorney would have to personally be aware of the results of previous cases because the lack of public disclosure often protects companies from setting a pattern or "precedent" with arbitral awards.¹⁶⁹

VI. CONCLUSION: LACK OF ACTUAL EFFECT OF THE ORDER ON EMPLOYEE CLAIMS

The Department of Labor estimates that there are roughly 24,000 businesses with federal contracts, and about 28 million employees under those contracts.¹⁷⁰ While this number may seem large, only a small fraction of these federal employees will actually bring employment discrimination claims. Taking into consideration all of the factors discussed, such as time, cost, reliability, diversity, and success rates, employees should feel that arbitration is a safe and secure place to bring employment discrimination and sexual harassment claims. Arbitration was developed as an alternative to litigation, and regardless of the Executive Order no longer allowing mandatory arbitration clauses, employees should still see it as the beneficial substitute it was designed to be.

¹⁶⁷ Bingham, *supra* note 161.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (Arbitral tribunals are not bound by precedent, but the lack of disclosure may make it easier for employers to "structure arbitration to their advantage unilaterally.")

¹⁷⁰ Chaunce Stanton, *Fair Pay and Safe Workplaces Executive Order*, GovDocs (Sept. 15, 2014), <http://www.govdocs.com/fair-pay-safe-workplaces-executive-order/>.